

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

DAVID E. BURDETTE,

)

8:08CV536

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Petitioner,

)

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v.

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**MEMORANDUM  
AND ORDER**

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FRED BRITTEN, warden,

)

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Respondent.

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On July 8, 2009, the court dismissed Petitioner's habeas corpus claims with prejudice and entered judgment against him. (Filing Nos. [12](#) and [13](#).) On July 30, 2009, Petitioner filed a timely Notice of Appeal of the court's Judgment (filing no. [14](#)) and a Motion for Leave to Appeal in Forma Pauperis (filing no. [15](#)).

Before Petitioner may appeal the dismissal of his Petition for Writ of Habeas Corpus, a "Certificate of Appealability" must issue. Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the right to appeal such a dismissal is governed by [28 U.S.C. § 2253\(c\)](#), which states:

- (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
  - (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; ....
- (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
- (3) The certificate of appealability under paragraph (1) shall indicate

which specific issue or issues satisfy the showing required by paragraph(2).<sup>1</sup>

A certificate of appealability may issue only if the applicant has made a substantial showing of the denial of a constitutional right. See [28 U.S.C. § 2253\(c\)\(2\)](#). Such a showing requires a demonstration “that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” [Slack v. McDaniel](#), 529 U.S. 473, 484 (2000) (internal quotation marks omitted), citing [Barefoot v. Estelle](#), 463 U.S. 894 (1983) (defining pre-AEDPA standard for a certificate of probable cause to appeal).

Petitioner has not filed a Motion for a Certificate of Appealability or a Brief in support. (See [Docket Sheet](#).) Thus, this matter cannot proceed on appeal until the question of the certificate of appealability is considered.

IT IS THEREFORE ORDERED that:

1. Petitioner shall have until October 1, 2009, to file a Motion for Certificate of Appealability and Brief in support.
2. In the event that Petitioner fails to file a Motion and Brief, as set forth in this Memorandum and Order, the court will deny the issuance of a Certificate of Appealability without further notice.

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<sup>1</sup>Similarly, [Federal Rule of Appellate Procedure 22\(b\)](#), as amended by the AEDPA, indicates that in an action pursuant to [28 U.S.C. § 2254](#), a notice of appeal triggers the requirement that the district judge who rendered the judgment either issue a certificate of appealability or state the reasons why such a certificate should not issue. See generally [Tiedeman v. Benson](#), 122 F.3d 518, 521 (8th Cir. 1997).

3. The Clerk of the court is directed to set a pro se case management in this case with the following text: October 1, 2009: check for filing of Motion for Certificate of Appealability.

September 1, 2009.

BY THE COURT:

*Richard G. Kopf*

United States District Judge

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